IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

TUESDAY, THE 30TH OCTOBER 2007 / 8TH KARTHIKA 1929

CRL.A.No. 835 of 2004(C)

SC.60/2000 of ADDL. SESSIONS COURT (ADHOC), THODUPUZHA
CP.21/1998 of JUDL. MAGISTRATE OF FIRST CLASS, PEERUMEDU
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APPELLANT:

KUNJUMON @ UNNI, S/O. VARKEY,
C.NO.8032, CENTRAL PRISON,
TRIVANDRUM-695 012.

BY ADV. SMT.SANGEETHA LAKSHMANA

RESPONDENTS:

STATE OF KERALA, REP. BY
PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI.NOBLE MATHEW

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30/10/2007, ALONG WITH CRA NO. 275 OF 2004 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & K.HEMA,JJ.

Crl.A.NO.835 OF 20O4
&
Crl.A.NO.275 of 2004

Dated this the 30th day of October, 2007

JUDGMENT

Koshy, J.

Two accused faced trial in SC.No.60 of 2000 on the file of the Sessions Court, Thodupuzha for offence punishable under Sections 449, 397, 302 read with Section 34 IPC. The allegation against them was that on 20.10.1997 with the common intention of committing robbery in the house of PW1, the two accused persons came to the premises of the house of PW1 and second accused stood guard near the house and first accused criminally trespassed into the said house and when PW2 who is the daughter of PW1 came to the house he threatened her by saying that he would kill her and thus put her in fear of death by catching hold of her neck and he robbed her of her two gold ear-studs and first accused entered into the right side bedroom of the said house and caught hold of PW1's mother Annamma from a cot and pulled down her to the floor and when Annamma attempted to make noise first accused took a wall clock of PW1 from the wall and beat her on her head and caused severe

injuries and robbed her of her gold chain of a weight of 5.500 grams by breaking it from her neck and also he committed theft of two imitation bangles and an amount of Rs.4,800/- from a bag inside an almirah there and from the possession of PW1. Annamma sustained fatal injuries and died in the Medical College Hospital on 29.10.1997.

2. After considering the evidence, first accused was sentenced to suffer rigorous imprisonment for a period of 10 years and to pay a fine of Rs.5,000/- for offence punishable under Section 449 IPC, to rigorous imprisonment for 7 years for offence under Section 397 IPC and to imprisonment for life and to pay a fine of Rs.10,000/- under Section 302 IPC. There is also a direction that these substantive sentences of imprisonment are ordered to run concurrently. Second accused was acquitted of offence charged against him under Sections 449, 397 and 302 read with Section 34 IPC. But he was convicted and sentenced to suffer rigorous imprisonment for a period of two years for the offence punishable under Section 411 IPC.

3. Criminal Appeal No. 835 of 2004 was filed by the first accused and Crl.A.No.275 of 2004 was filed by the second accused. PW1 gave first information statement. PW1 is the son of the accused. According to him, at about 3.30 pm he had returned from his farm to the house and after that he went to a school at Meloram for teaching dance to his child (PW2) and another children. PW2

went to the house for having food she returned to the school at about 4.30 pm and stated that one man was in the house and he had threatened PW2 with death and caught hold of her neck and demanded her gold chain and ear-studs and consequently as she was frightened, she was forced to deliver her gold chain and ear-studs to him and also that man entered into the room of the grand mother and snatched the grand mother's gold chain and coat was overturned. PW1 immediately rushed to his house along with two friends and saw his mother lying on the floor inside the house in an injured condition. She had bleeding injuries on head. The house-hold articles were lying scattered. He called a vehicle with the help of his friends and took his mother to the Kanjirappally Government Hospital and from there to the Kottayam Medical College Hospital and she was treated there and after a few days his mother passed away. He also stated that two imitation bangles and an amount of Rs.4,800/- which he had kept in the almirah inside the house were stolen. His mother's gold chain weighing 5 grams was stolen. His wall clock was lying on the floor. Household vessels were broken. MO1 is his deceased mother's lost gold chain. MO2 is PW2's stolen ear-studs. MO3 is PW2's lost gold chain. MO4 is another lost ear-stud of PW2. MO5 is the clock. MO6 is his lost bangle. MO6 series are the two imitation bangles lost. MO7 is the purse lost.

4. PW2 inflicted injuries on the deceased. But she deposed the above version as deposed by PW1. She deposed that when he came to the house, one man was standing at the upstairs and seeing her, he went away. Another man was inside the house. He threatened her with death and caught hold of her neck and obtained her gold chain and gold ear-studs which are Mos 2 to 4 and after that he went to the deceased grand mother's room and hit her with MO5 clock and pulled her down from the cot and robbed her of her MO1 gold chain and immediately she ran away frightened and reached the school and reported the matter to PW1 who is her father. She stated that she has not seen the second accused. She categorically deposed that it was accused No.1 who inside her house threatened her with death and caught hold of her neck forcefully and induced her to deliver her Mos 2 to 4 gold ornaments and took her deceased grand mother's MO1 gold chain after hitting her on head with MO5 clock. She immediately reported these facts to PW3 and PW5, corroborated the evidence of PW2, who saw the first accused near the house of PW1 near the time. It is also stated PW13 Circle Inspector of Police that at the disclosure of first accused, one chain, one ear-stud and two bangles are concealed in a Kayyala. It is covered in a paper and on the basis of the confession, MO1, MO2 and MO6 series were found out. It was recovered as per Exhibit P8 mahazar. Exhibit P8(a) is the marked portion of Exhibit P8. MO1,

MO2 and MO6 found out at the instance of first accused corroborate the evidence of PW2 and identification of first accused. The recovery was effected within four days of the incident. MO1, MO2 and MO6 were identified by PW1 and PW2. It has also come out in evidence that on the basis of the confession given to PW14 by second accused, MO3 was found out from his house compound. Apart from that, there was no evidence against second accused. The trial Judge fully believed the evidence of PW2. Of course, she was only a VIIth standard student at the time of the incident. But a VIIth standard student can remember things especially first accused caught hold of her neck and she was forced to deliver her gold chain and ear-studs to first accused and thereafter she also saw him entering into grand mother's room and beating her and forcibly taking away her ornaments.

5. Counsel for the appellant argued that no identification parade was conducted. It is only a part of investigation (see ***Hafib v. State of Bihar*** (AIR 1972 SC 283). The substantive evidence is the identification of the accused in court. Here, PW2 who saw the first accused, who compelled her to give her bangles will not forget the first accused in her life. She identified the first accused in court. Apart from the above, PW3 and PW5 who are neighbours saw the first accused and they also identified in court. In 313 statement he stated that he was away for kooli work. Secondly, it was contended

that finger print was not taken from the the clock used to beat the deceased. PW1 came and found the clock lying down and entered the room which is in a dilapidated condition. Defects in the investigation is not a ground for acquittal, when there is clear evidence against the accused as held by the Apex Court in ***Bikau Pandey and others v. State of Bihar*** (AIR 2004 SC 997) and ***State of Rajasthan v. Kishore*** (AIR 1996 SC 3035). When the evidence of witnesses are clear, cogent and believable, the accused cannot get the benefit of acquittal. We see no ground to interfere with the conviction and sentence passed against the first accused as the offence alleged against him were proved clearly. There is no merit in Crl.A.No.835 of 2004 and hence the appeal is dismissed.

6. With regard to the appeal filed by second accused is concerned, he was convicted for offence punishable under Section 411 IPC. There is no evidence that he came along with first accused. He was not convicted for offences punishable under Sections 447, 397 and 302 IPC. There was no charge under Section 411 IPC. Merely because PW4's evidence that MO3 stud was found on the basis of the confession, he cannot be convicted for the offence punishable under Section 411 IPC. Apart from the fact that there is no authorship of concealment, since there was no charge under Section 411, second accused cannot be convicted for the offence under Section 411. It was also not proved against him. No appeal

was filed by the State against the acquittal of second accused for the offence charged against him. There is no evidence to show that he was seen present in the scene of occurrence or he has committed any of the offences mentioned in the charge. Offence under Section 411 is not a lessor offence of the one punishable under Section 397 IPC. Ingredients of the offences are entire different. In the above circumstances, conviction and sentence passed against the second accused under Section 411 IPC is set aside and he is acquitted. Crl.A.No.275 of 2004 is allowed.

J.B.KOSHY, JUDGE

K.HEMA, JUDGE

vgs.

J.B.KOSHY & K.HEMA, JJ.

Crl.A.NO.835 OF 20O4

&

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JUDGMENT

30.10.2007